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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-875

ANTHONY G. FORGIONE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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December 2, 1973

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions	2
Constitutional Amendments	2
Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	7
Appendix	
A — Opinion of the United States Court of Appeals for the First Circuit	8
B — Judgment of the United States Court of Appeals for the First Circuit	13
C — Title 21, Section 622	
§622. Bribery of or gifts to inspectors or other officers and acceptance of gifts	14
D — Title 7, Code of Federal Regulations	
Part O — Employee Responsibilities and Conduct	15

Citations

United States v. *Seuss*, 1 Cir., 1973, 474 F.2d 385, *cert. denied* 412 U.S. 928	3

Statutes Cited

Constitution of the United States, Amendment 5	2
Title 21, United States Code, Section 622	2

Regulations Cited

7 Code of Federal Regulations	
Section 0.735.12	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Anthony G. Forgione, petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered on November 5, 1973, affirming the judgment of the United States District Court for the District of Massachusetts as to petitioner's conviction on three counts of accepting a gift, money or other thing of value from a person, firm or corporation engaged in interstate commerce, all in violation of 18 U.S.C. § 622.

Opinion Below

No opinion was delivered by the United States District Court for the District of Massachusetts wherein these proceedings originally commenced. The opinion of the United States Court of Appeals for the First Circuit has not yet been officially reported but is reproduced herein as Appendix "A".

Jurisdiction

Jurisdiction to review the judgment referred to is conferred on this Court by 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals commit error in its affirmation of the District Court's denial of the defendant-petitioner's motion for judgment of acquittal based on:

(a) No proof that the donors of alleged gifts to the defendant were, as required by the statute, "persons" engaged in interstate or foreign commerce.

(b) The Government's proof did not exclude an acceptable or legitimate basis for alleged gifts.

Constitutional Provisions Involved

AMENDMENT 5

No person shall be . . . deprived of . . . liberty or property without due process of law . . .

Statutory Provisions

Title 21, Section 622, which is reproduced at Appendix C herein, page 14.

Regulations Involved

Title 7, Code of Federal Regulations, Section 0.735.12 is reproduced at Appendix D herein, page 15.

Statement of the Case

The Grand Jury for the United States District Court for the District of Massachusetts returned a multi-count indictment charging petitioner with violations of Title 21, United States Code, Section 622. The Government selected ten counts for trial, and a jury returned verdicts of guilty on three counts, each of which charged the petitioner with having received several pounds of meat products from an employee of a firm whose products the petitioner was employed to inspect. The petitioner was sentenced to imprisonment for one year. The same trial jury acquitted the petitioner on the seven other counts on which he was put to trial.

Reasons for Allowing the Writ

This case raises important questions of Federal and constitutional law this Court has in the recent past declined to resolve.[1] It is suggested, however, that the nation's almost all-consuming reaction to alleged and proved improprieties of public servants and government employees heightens the urgent need to have this Court shine light on the standards set forth in the pertinent part of Title 18, United States Code §622. Over forty inspectors in the area of Boston, Massachusetts were indicted in October of 1971 for violation of this statute. These indictments resulted in various trials and other proceedings before each of the

[1] An identical issue was raised in *United States* v. *Seuss*, 1 Cir., 1973, 474 F.2d 385, *cert. denied* 412 U.S. 928.

District Court Judges who sit in the District of Massachusetts and, in some instances, before visiting judges, whose presence was necessary to clear an already clogged docket. The results varied from pleas of guilty to jury acquittals. Indeed, as in the instant case, there were seemingly inconsistent results of guilty verdicts on some counts and, without discernible differences, acquittals on other counts. Again, as all too often is the case, in instances where the offenses charged were much the same and defendants' backgrounds otherwise similar, sentences fluctuated widely; probation in some cases, imprisonments for terms up to three years in others, all to the end that defendants, lawyers and the public have been left in the almost predictable confusion that often results from unpredictable standards. The punishment imposed on this and other like defendants is, per se, of little or no importance to the reasons for granting this writ. What is important, we suggest, is that the differences in punishment for citizens who have spent most of their adult life as governmental employees and have otherwise been responsible members of their community mirror the necessity for Congress to enact legislation that clearly sets forth prohibited conduct in all areas that involve those who are employees of the public. The area of concern is not only to the many defendants in this and future series of similar cases. It is an area of concern that falls in relevant and timely step to the pressing major concern of our nation.

The Court of Appeals summarily dealt with the issue herein relied on, referring to its recent "extensive analysis" of the matter in *United States* v. *Seuss, supra.*

Treating 21 U.S.C. §622 as dealing in three parts with the bribery and corruption of meat inspectors, the third portion reads in relevant part that:

> "... and any inspector ... who shall receive or accept from any person, firm or corporation engaged in interstate or foreign commerce, any gift, money or other thing of value, given with any purpose or intent whatsover, shall be deemed guilty of a felony and shall, upon conviction thereof be summarily discharged from office and shall be punished by a fine ... and by imprisonment ..."

In short, upon the receipt of any thing of value, the inspector commits a violation even though his mind is innocent or free from corrupt intent and in total disregard of his pursuing his official duties with zeal and vigor sufficient to warrant special commendation. No exaggerated example or hypothetical improbability should be permitted to subtract from the simple and obvious fact that a most innocent act of the most conscientious meat inspector can result in terrifying consequences. Likewise, it would seem that the abnormal built-in-breadth of the statute should resist further expansion by judicial alteration. However, no less was accomplished by the Court below.

The petitioner had been charged with accepting meat products from an *employee* of a firm (Colonial Provision Co.) engaged in interstate commerce. As acknowledged by the Court of Appeals in its opinion in the instant case, "... there was no proof that the employees themselves were engaged in commerce." Appendix A, Opinion, Page 1.

There is nothing in the legislative history of Section 622 to warrant the *addition* of employees as proscribed donors, and there has been "no judicial construction of this provision which has been on the books for over half a century." The Court below found justification for its conclusion "... from the legislative purpose, the regulations promulgated by the Department of Agriculture to govern 'employee responsibilities and conduct' ... and the general

bribery statute for federal officials, 18 U.S.C. §201," *United States* v. *Seuss, supra,* at p. 388. Such reasoning, however, can only be credited by ignoring what otherwise seems obvious: when Congress intended to include *employees* as donors it said so in parts one and two of the Statute.[2] It also ignores the obvious fact that hte pertinent part of Section 622, in removing the necessity of showing scienter, was commanding peripheral vision as to what was being received, while at the same time sensibly narrowing the field with respect to the donors; limiting the latter to the person (corporate or individual) actually engaged in the interstate or foreign commerce.

In *Seuss,* the Court of Appeals for the First Circuit wanted no mistake to be made that in their view all that the government had to establish was "... a gift by an employee of a company engaged in interstate commerce" and regarded as an unfair and onerous burden for the government "to prove that the employee was acting as the agent of his employer who was the real donor". *Seuss, supra,* at p. 390. This interpretation is in accord with that Court's expressed view that to find otherwise would too readily permit of subterfuge and encourage deviousness in the relations between the businessman and meat inspector: e.g., "... for it would mean that even acceptance of a car from a pool of employees of a meat packing concern, purporting to be a birthday gift, could not be punishable unless the government could present some proof that this gift was pursuant to the urging, suggestions, direction, or policy of the company's board, officers, or supervisors..." *Seuss, supra,* at p. 388. The example, we suggest, highlights the tenuous

[2] Part one, covering the giving of intentional bribes, refers to the donor class as "any person, firm or corporation or any agent, employee of any person, firm or corporation."

Part two, covering the receipt of intentional bribes, refers to the donor class as "any person, firm or corporation or officers, agents or employees thereof."

and improbable reasoning that led to the Circuit Court's conclusion; it carries with it the unwarranted presumption of widespread connivance, not only between inspector and businessman but also the imaginary horrible of "pool(s)" of employees conspiratorially aiding and abetting the plan.

In part three of the statute, Congress provided the same penalty as that to be imposed for violations of parts one and two; each of which requires a showing of criminal intent. The rewrite of part three, by the Court below, serves to abolish the only meaningful distinction between part two and three: the class of donor.

Conclusion

For the reasons stated, it is respectfully prayed that this petition for a writ of certiorari be granted and that the decision of the Court of Appeals be reversed and that the judgment of the District Court be vacated.

Respectfully submitted,

JOSEPH J. BALLIRO
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Boston, Mass. 02210
Counsel for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 73-1202

UNITED STATES OF AMERICA,
APPELLEE,
v.
ANTHONY G. FORGIONE,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

Walter J. Hurley on brief for appellant.
James N. Gabriel, United States Attorney, and *Lawrence P. Cohen*, Assistant United States Attorney, on brief for appellee.

November 5, 1973

ALDRICH, *Senior Circuit Judge*. This is an appeal by a government meat inspector convicted of accepting gifts from a person, firm or corporation engaged in commerce, in violation of 21 U.S.C. § 622. Defendant received gifts of meat products from the hands of employees of a firm whose products he was assigned to inspect. There was no proof that the employees themselves were engaged in commerce. In *United States* v. *Seuss*, 1 Cir., 1973, 474 F.2d 385, *cert. denied* 412 U.S. 928, we upheld, after extensive analysis, the validity of section 622, and its applicability to a substantially identical fact situation. We would have affirmed the present conviction without opinion on the government's motion for summary affirm-

ance pursuant to Local Rule 12, except that we feel obliged to comment.

In *Seuss* we stated that employees of a firm engaged in commerce were included in the statutory term "person[s] . . . engaged in commerce" in section 622. Defendant argues that this language in *Seuss* should not govern because his offenses were less extensive than those of Seuss. It is true that defendant was acquitted on some counts of his indictment (alleged gifts of money, as distinguished from meat products), but to argue that the statutory interpretation in *Seuss* is here inapplicable because Seuss was "a more flagrant and serious offender," and was also convicted of conspiracy, is an inexcusable attempt to confuse differences in the number of offenses with differences in the qualitative acts and circumstances of each offense. Examination of the *Seuss* opinion refutes any thought that these purported distinctions are of conceivable moment. As a final irrelevancy, defendant refers to the fact that in *Seuss* evidence was given indicating that Seuss had violated federal sampling procedures, whereas here the government failed to show defendant "rendered a quid pro quo by way of lessening his diligence." Such a showing was relevant to Seuss' conspiracy offense. In this prosecution there is no such issue.

Equally unsupportable is defendant's position on a question asked of a government witness.

> "Q. Mr. Scalesse, on what facts did you rely in making these payments of money to Inspector Forgione from August 28, 1968 to and including October 15, 1968?"

When defendant's objection had been overruled, the witness answered,

> "A. So that we wouldn't be held up or slowed up in any production. That is the reason we made these payments and those are the facts."

Review of thirty pages of bench conferences preceding the framing of this question discloses that the defense agreed that it was relevant whether "any facts existed which entitled this defendant to the $100 a week," but stated that it would object to questions calling for the witness' "state of mind," or his "reasons" for making the payments. The objection to "reasons," as best we can discover, was that they might reflect the witness' "state of mind" rather than "facts." When, following this discussion, the question was asked in terms of facts, defendant objected, but did not explain. Now he argues that the question was "clearly erroneous for the reason that the question called for facts not within the witness' knowledge."

Nothing could be clearer than that the question did not "call" for facts of which defendant lacked personal knowledge. True, it was broad enough to permit them. This is an objection to form, which could have been cured, if made. It is elementary that it is now too late. *See, e.g.*, 5A Moore's Federal Practice § 46.02, at 1904 (1971); *Roberts* v. *United States*, 3 Cir., 1963, 316 F.2d 489, at 497; *Reck* v. *Pacific-Atlantic S. S. Co.*, 2 Cir., 1950, 180 F.2d 866, 870; *cf. New York, N. H. & H. R. Co.* v. *Zermani*, 1 Cir., 1952, 200 F.2d 240, 245, *cert. denied* 345 U.S. 917.

Parenthetically, whatever possible defect there might have been in this question, we would find it difficult to see what is left of defendant's objection after the court, by unobjected-to questions at the close of the examination, brought out the basic fact that there was no reason for the alleged payments other than the facts that defendant was an inspector and had requested them. But, however that may be, defendant faces a more serious difficulty. He was acquitted on all the counts on which the question bore. He thus finds himself compelled to argue that the answer to a question which proved to have no direct con-

sequences somehow carried the day in an area to which it did not relate. Even to state this contention would seem to answer it. We find unpersuasive defendant's suggestion that the jury's view of the entire case may have been colored by this one answer.

Unsupportable, too, is defendant's objection to the fact that a government witness' explanation of his conduct involved a reference to criminal acts (if established) other than those for which defendant was on trial. Again, it is elementary that evidence of other criminal acts, inadmissible to prove the defendant's bad character, is admissible when of independent relevancy. We are not taken by defendant's plea that the correctness of *United States* v. *Jones,* 7 Cir., 1971, 438 F.2d 461, is an open question in this circuit. *See United States* v. *Plante,* 1 Cir., 1973, 472 F.2d 829, at 831, *cert. denied* 411 U.S. 950; *Dirring* v. *United States,* 1 Cir., 1964, 328 F.2d 512, 514-15, *cert. denied* 377 U.S. 1003.

We see no need to devote space to demonstrate the lack of merit in defendant's complaint that the "jury may have been confused whether a government witness used certain papers as past recollection recorded or present recollection refreshed," and that the court abused its discretion in permitting leading questions. As to the former we can best quote Professor Wigmore, Evidence (3d ed. 1970) § 755, that such distinctions tend to become "vain quibbles, having no relation to probative value." The witness evidenced no more confusion than any lay witness might. We see no error, and no possible prejudice if there were one. As to the latter, the questions, if leading at all, were routinely within the court's discretion.

We recognize, we hope fully, the right, indeed the duty, of counsel to resolve all issues of any possible doubt in favor of his client, and to be a vigorous, sometimes even abrasive advocate. See discussion in *In re Samuel A.*

Bithoney, 1 Cir., 10/23/73 F.2d . In the case of appointed, as distinguished from, as here, retained counsel, we have recognized the heightened dilemma of being caught between an unreasoning client and counsel's own good judgment. *See Belbin* v. *Picard*, 1 Cir., 1972, 454 F.2d 202, at 204. But there must be a limit. *In re Samuel A. Bithoney*, ante; *United States* v. *Plante*, ante, 472 F.2d at 833; *cf. Anders* v. *California*, 1967, 386 U.S. 738, at 744. The empty contentions made in the present case go far beyond that limit. We publish this opinion not because of any contribution it makes to the law, but so that the bar may be in no doubt as to our views.

The judgment of the District Court is affirmed, and, pursuant to Local Rule 17, it is ordered that defendant's bail be terminated forthwith.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1202

UNITED STATES OF AMERICA,
APPELLEE,
v.
ANTHONY G. FORGIONE,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: November 5, 1973

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed, and, pursuant to Local Rule 17, it is ordered that defendant's bail be terminated forthwith and that mandate issue forthwith.

By the Court:
(s) DANA H. GALLUP
Clerk.

COFFIN, CH. J.

[cc: Messrs. Hurley and Gabriel.]

APPENDIX C

TITLE 21, SECTION 622

§ 622. Bribery of or gifts to inspectors or other officers and acceptance of gifts

Any person, firm, or corporation, or any agent or employee of any person, firm, or corporation, who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter or by the rules and regulations of the Secretary any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty provided for in this subchapter, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not less than $5,000 nor more than $10,000 and by imprisonment not less than one year more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than $1,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years.

Mar. 4, 1907, c. 2907, Title I, § 22, formerly 20th par., 34 Stat. 1264, renumbered and amended Dec. 15, 1967, Pub. L. 90-201, §§ 1, 3, 81 Stat. 584, 588.

APPENDIX D

TITLE 7, CODE OF FEDERAL REGULATIONS

PART 0.—EMPLOYEE RESPONSIBILITIES AND CONDUCT

SECTION 0.735.12:

§ 0.735-12. Gifts, entertainment, and favors

(a) Except as provided in paragraphs (b) and (e) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, unusual discount, or any other thing of monetary value from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department;

(2) Conducts operations or activities that are regulated by the Department; or

(3) Has interest that may be substantially affected by the performance or nonperformance of his duty.

(b) The restrictions in paragraph (a) of this section do not prohibit:

(1) Acceptance of any of the usual courtesies in an obvious family or personal relationship (such as those between the employee and his parents, spouse, children, or close personal friends) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors;

(2) Acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans;

(3) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other things of nominal value; and

(4) The exchange of usual social courtesies which are wholly free of any embarrassing or improper implications.

(c) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit the voluntary giving or acceptance of a gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided in 5 U.S.C. 7342.

(e) Neither this action nor § 0.735-13(a) precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by decision B-128527 of the Comptroller General dated March 7, 1967 (46 Comp. Gen. 689).

SUPREME COURT, U. S.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-875

ANTHONY G. FORGIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the construction and validity of 21 U.S.C. 622, the statute under which he was convicted.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on three counts of a ten-count indictment charging him with having accepted a gift, money or other thing of value from a person, firm or corporation engaged in interstate commerce, in violation of 21 U.S.C. 622. He was sentenced to concurrent one year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

The legal issues raised in the instant case are identical to those involved in *United States* v. *Seuss*, 474 F.2d 385 (C.A. 1), certiorari denied, 412 U.S. 928, which also involved a virtually identical fact pattern. Petitioner,

a meat inspector for the United States Department of Agriculture, on several occasions accepted meat products as a gift from Colonial Provision Company, Inc., a Boston meat processing company engaged in interstate commerce. In responding to petitioner's contentions herein, we rely upon the opinion of the court of appeals in *Seuss, supra,* and in this case, as well as our Memorandum in Opposition to the petition for a writ of certiorari in *Seuss* (No. 72-1266).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[1]A copy of our Memorandum in *Seuss* is being sent to counsel for petitioner.